SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 654

TIIDEE PRODUCTS, INC.,

Petitioner,

and

NATIONAL LABOR RELATIONS BOARD,

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondent.

RESPONSE TO MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereafter referred to as the "Respondent Union"), which has joined in the instant Petition, has submitted a Reply Brief which cogently argues that this case is ripe for review. In addition to the considerations described in the Reply Brief, we believe that the following reasons also demonstrate that the position of the National Labor Relations Board in its Memorandum In Opposition is in error.

1. The Memorandum In Opposition argues that upon

remand, "should the Board refuse the make-whole remedy in this case, its expressed reasons may satisfy the court of appeals." Mem. Opp. p. 3. Initially, this contention is irrelevant for, as the Respondent Union observes, the result would merely be a further effort by the Union, without the benefit of any intervening illuminating litigation, to obtain review by this Court. Moreover, it taxes the imagination to conceive of how the Board, at this late date, can now express reasons that would be satisfactory to the court below. The Board has already passed on this case once and declined to grant a make-whole remedy. App. B to Pet., pp. 2a-4a, 37a-39a. It was unsuccessful, however, in convincing the court of appeals that the reasons for this decision were persuasive.

Subsequently, in its decision in *Ex-Cell-O Corporation*, 185 NLRB No. 20, *appeal docketed sub. nom., Automobile Workers* v. *N. L. R. B., No. 24577*, D. C. Cir., August 26, 1970 (App. C to Pet.), the Board, after over three years of deliberation, "seriously explor[ed]", in the words of its Chairman, "the legislative history of the Act, the law itself, and available judicial precedent bearing upon the matter . . . the question was not an easy one . . . both the majority and minority presented substantial legal and practical arguments in favor of their respective positions." Board Chairman Edward B. Miller in a speech entitled "First Impressions" delivered to the Ninth Annual Corporate Counsel Institute of Northwestern University Law School, October 8, 1970, reprinted at 196 Daily Labor Reports D-1, D-4 (BNA, October 8, 1970). Yet the Board majority's "substantial legal and practical arguments" for its conclusion that there were "insuperable legal and practical obstacles" to imposition of a make-whole remedy (*Ibid.*) did not constitute, according to the court of appeals, "the kind of supplementary finding contemplated by our opinion of April 3, 1970, in this cause". Order of the Court of Appeals, September 21, 1970 (App. to Supp. to Pet.)

2. The Memorandum In Opposition also contends that, upon remand, the Board could "provide lesser, alternative relief which neither party appeals or which the court concludes is adequate in the circumstances here". Mem. Opp. p. 3. This argument disregards the position of the Respondent Union that it will accept nothing less than a full make-whole remedy. At some point in time, therefore, a resolution by this Court will be needed on the conflict which exists between the Board and the court of appeals as to the propriety of such a remedy. It is this critical issue—apart from the availability of a mutually-unsatisfactory alternative remedy—which requires resolution by this Court. As an observer in the *Wall Street Journal* recently commented, "[e]xperts believe it will be up to the [Supreme] Court to define the extent of NLRB powers and the remedies it can ultimately accord workers under the National Labor Relations Act." Carlson, *Seeking Speedier Justice at the NLRB*, Wall Street Journal, September 25, 1970. We concur in the Respondent Union's view that "[t]he present case presents an excellent vehicle for such clarification." Br. in Supp. p. 15.

Respectfully submitted,

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